

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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| JOHN A, PATTERSON, M.D., MSPH, |) |
| FR. JOHN RAUSCH, and WENDELL BERRY, |) |
| |) |
| |) |
| |) No. 2009-00426 |
| |) |
| Complainants, |) |
| |) |
| v. |) |
| |) |
| EAST KENTUCKY POWER COOPERATIVE, INC. |) |
| |) |
| Defendant |) |

**COMPLAINANTS' MOTION FOR LEAVE TO FILE AN AMENDED
COMPLAINT**

Pursuant to 807 K.A.R. 5:001 § 3(5), Complainants John A. Patterson, M.D., MSPH, Father John Rausch and Wendell Berry respectfully request leave to file their First Amended Complaint in the above captioned case. In support of this motion, Complainants state the following:

I. PROCEDURAL BACKGROUND

The genesis of this case can be found in another, previous case before the Commission. The Sierra Club, Kentucky Environmental Foundation and Kentuckians for the Commonwealth [collectively "Groups"], who were original Complainants in this case, were interveners in the Commission's case reviewing East Kentucky Power Cooperative's (EKPC) 2009 Integrated Resource Plan. *See* In the Matter of 2009 Integrated Resource Plan Of East Kentucky Power Cooperative, Inc. Case No. 2009-00106. In the 2009 Integrated Resource Plan case, the Commission stated that:

a case to review an IRP is not an appropriate forum for an intervener to challenge a prior Commission decision which granted a CPNC to construct a new generating unit based on a finding of need. Such a

challenge may be initiated by a complaint filed by an interested party, or by the Commission on its own motion, pursuant to KRS 278.260.

Case No. 2009-00106, Order at 7-8, (Ky. PSC, July 13, 2009). Thus, following this statement, on October 28, 2009 the Groups, along with Dr. Patterson, Father Rausch, and Mr. Berry initiated this case which is a challenge to the Certificate of Public Convenience and Necessity (“Certificate”) for EKPC’s J.K. Smith circulating fluidized bed unit #1 (Smith #1) by filing a complaint pursuant to KRS § 278.260.

The Commission then dismissed Claims 1 and 9¹ and also dismissed the Sierra Club, the Kentucky Environmental Foundation (KEF), and Kentuckians for the Commonwealth (KFTC) as Complainants. Case No. 2009-00426, Order (Ky. PSC, Dec. 22, 2009).

II. REQUESTED AMENDMENTS²

A. THE FIRST AMENDED COMPLAINT ADDS MIKE HANNON

The First Amended Complaint adds Mike Hannon as a complainant. Mike Hannon is a long time EKPC customer. By EKPC customer, we mean a customer of a distribution cooperative that is an owner of EKPC and gets its wholesale electricity from EKPC. Mr. Hannon is a member of the Board of Directors of KEF and has been for over 20 years. Mr. Hannon, who ultimately is a customer of EKPC, has authorized KEF to file this complaint under KRS 278.260 on his behalf.

¹ Claim One asserted the CPCN is no longer valid because EKPC must obtain financing from private entities, not through Rural Utility Services (“RUS”) as was the understanding of the Commission when the CPCN was granted. Claim Three asserted the CPCN is void because EKPC failed to commence construction within the one-year period as required by statute. The Commission’s Order referred to Plaintiffs’ Claim Three as Claim Nine because the Commission’s Order referred to the seven different factual bases for Claim Two as separate claims. However, seven different factual bases are cumulative and synergistic in nature.

² The First Amended Complaint also includes some minor grammatical corrections and updates.

B. THE FIRST AMENDED COMPLAINT ADDS BACK KEF, KFTC, AND SIERRA CLUB AND CLARIFIES THAT THEIR MEMBERS, WHO ARE ALSO MEMBERS OF EKPC, AUTHORIZED THE GROUPS TO FILE THIS COMPLAINT

The First Amended Complaint adds back KEF, KFTC, and Sierra Club as complainants. The Commission dismissed KEF, KFTC, and Sierra Club as complainants in its December 22, 2009 Order. However, that Order dismissed KEF, KFTC, and Sierra Club without prejudice. Dec. 22, 2009 Order at 6. The Order explained:

The Sierra Club, the Kentucky Environmental Foundation, and Kentuckians for the Commonwealth have standing to file a complaint under KRS 278.260 on behalf of their members only to the extent that they have been authorized to do so by their respective members who ultimately are customers of EKPC.

Dec. 22, 2009 Order at 5. The First Amended Complaint now states that Mike Hannon authorized KEF to file this complaint and Mr. Hannon is a member of KEF and ultimately a customer of EKPC. The First Amended Complaint also states that Fr. Rausch and Wendell Berry authorized KFTC to file this complaint and they are members of KFTC and ultimately customers of EKPC. Finally, the First Amended Complaint states that Wendell Berry authorized Sierra Club to file this complaint and that he is a member of Sierra Club and ultimately a customer of EKPC. Thus, the First Amended Complaint clarifies that KEF, KFTC and Sierra Club have “standing” to be complainants.

C. THE FIRST AMENDED COMPLAINT ADDS BACK IN THE CLAIM REGARDING THE EXPIRATION OF THE CERTIFICATE AND CLARIFIES THAT DELAYS IN PERMITTING ARE NOT THE CAUSE OF EKPC’S FAILURE TO COMMENCE CONSTRUCTION.

The First Amended Complainant also adds back the claim regarding the expiration of the Certificate for Smith #1. The December 22, 2009 Order states:

Claim 9 alleges that EKPC has failed to commence construction of Smith Unit 1 within the one-year period as required by KRS 278.020(1). The CPCN statute, KRS 278.020(1), provides, in relevant part, as follows:

Unless the CPCN is exercised within one (1) year from the grant thereof, exclusive of any delay due to the order of any court or failure to obtain any necessary grant or consent, the authority conferred by the issuance of the certificate of convenience and necessity shall be void.

Claim 9, however, fails to point out whether EKPC's failure to commence construction of Smith Unit 1 is as a result of a delay due to any judicially imposed order or any failure by EKPC to obtain a necessary grant or consent. The Commission will take notice of EKPC's March 9, 2009 filing in Case No. 2009-00106, which states that, "EKPC currently has outstanding air permit requests for both Smith Unit 1 and 2 which should be ruled upon by the appropriate permitting agencies in the coming month." Thus, even if EKPC has been granted an air permit for Smith Unit 1 subsequent to its March 9, 2009 filing-which is uncertain-it is still within the one-year statutory period for exercising the certificate. The Commission, therefore, finds that Claim 9 has failed to establish a prima face case.

Dec. 22, 2009 Order at 4-5. At the time of filing the complaint, the Complainants did not know that EKPC had not obtained financing. Sierra Club had sued the Rural Utility Services under the Freedom of Information Act to find out the status of EKPC's attempts to get financing but did not get an answer until after it filed the complaint. Now that the complainants know that EKPC does not have financing, the First Amended Complaint explains that the delay in EKPC's commencing construction is not due to a failure to obtain the necessary grants and consents; it is due to EKPC's lack of financing. Therefore the claim regarding the expiration of the Certificate has been added back in.

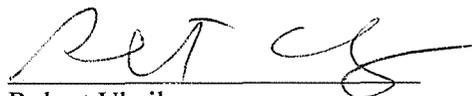
This represents a textbook case for why the one year expiration period is needed for Certificates. The passage of time has greatly altered the situation so that the analysis of whether Smith #1 will serve the public convenience and necessity is substantially

different. The increase in capital cost of over a third of a billion dollars should certainly make that clear.

III. CONCLUSION

Therefore, for the reasons explained above, the Commission should grant leave for the filing of the First Amended Complaint.

Respectfully submitted,



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Dated: March 24, 2010

CERTIFICATE OF SERVICE

I certify that I e-mailed a copy of the above on the following on March 24, 2010.

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